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COURT OF CRIMINAL APPEALS
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PD-1012-16

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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LANNY MARVIN BUSH,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE

APPELLANT'S BRIEF ON THE MERITS

ELEVENTH COURT OF APPEALS CAUSE NO. 11-14-00129-CR
42ND DISTRICT COURT OF COLEMAN COUNTY CAUSE NO. 2602

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Oral Argument Has Not Been Permitted By The Court

IDENTITIES OF PARTIES AND COUNSEL

Pursuant to the provisions of Rule 38.1(a), Texas Rules of Appellate Procedure, a complete list of the names of all parties to this action and counsel are as follows:

Parties:	Mr. Lanny Marvin Bush, Appellant TDCJ No. 01917810 Michael Unit 2664 FM 2054 Tennessee Colony, Texas 76886 State of Texas, Appellee
Attorneys for the Appellant:	Mr. Patrick Howard P.O. Box 74 101 South First Bangs, Texas 76823 (Current Appellate Attorney) Mrs. Emily Miller Woodley and Dudley, Lawyers 707 Center Avenue Brownwood, Texas 76801 (First Appellate Attorney) Mr. Perry Sims Attorney at Law 5601 19th Street Lubbock, Texas 79407 (Trial Attorney)

Attorneys for Appellant:	Mr. Heath Hemphill District Attorney 42nd Judicial District 114 West Live Oak Street Coleman, County Texas Coleman, Texas 76834 (Trial and Appellate Counsel)
	Mr. Micheal Murray District Attorney, 35th Judicial Brown and Mills Counties, Texas 200 South Broadway Street, Suite 323 Brownwood, Texas 76801 (Trial Counsel)
	The Honorable Sam C. Moss* First Assistant District Attorney, 35th Judicial District, Brown and Mills Counties, Texas 200 South Broadway Street, Room 208 Brownwood, Texas 76801 (Trial Counsel) ** Mr. Moss assumed the bench of Brown County Court at Law effective January, 2015*
	Mrs. Elisha Bird Assistant District Attorney, 35th Judicial District, Brown and Mills Counties, Texas 200 South Broadway Street, Suite 323 Brownwood, Texas 76801 (Appellate Counsel)
Trial Judge:	The Honorable John Weeks 401 Oak Street, Suite 401 Abilene, Texas 79602

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TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Lanny Marvin Bush, Appellant in this cause, by and through his attorney of record, Patrick Howard and respectfully requests this Court uphold the Eleventh Court of Appeals finding the evidence was insufficient to support Appellant's conviction for Capital Murder:

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

PROCEDURAL HISTORY OF THE CASE

Appellant was indicted in Cause No. 2602 for Capital Murder of Michele Reiter by means unknown while in the course of committing or attempting to commit the offense of kidnapping. (CR 9)[1]. On April 11, 2014, Appellant was convicted by jury in the 42nd District Court, Coleman County, Texas with capital murder, TEX. PENAL CODE §19.03, alleged to have occurred on September 20, 2012. (CR 105, 107-108). On April 11, 2014, the court assessed punishment of life without parole in prison. (CR 107-108). A Motion for New Trial was filed in the 42nd District Court on May 8, 2014. (CR 114). The motion was overruled by operation of law on or about June 25, 2014.

Appellant gave timely written notice of appeal on May 8, 2014. (CR 117). Trial counsel was appointed for the Appeal in May 2014 and an Order to Withdraw was granted on December 11, 2014 due to counsel's new employment. Appellant's previous appellate counsel was appointed on December 29, 2014 and represented the Appellant in the previous Appeal before the Eleventh Court of Appeals.

[1] "CR" Refers to Clerk's Record. The Reporter's Record is referenced by "RR" Volume and page number.

On August 11, 2016, the Eleventh Court of Appeals held the evidence was insufficient to support the allegation that the murder offense was committed while in the course of committing or attempting to commit the offense of kidnapping. *Bush v. State*, No. 11-14-00129-CR, 2016 WL 4385896, at *7 (Tex.App.--Eastland Aug. 11, 2016, pet. granted) (Mem. Op., not designated for publication). The Court reversed the capital murder conviction, but the Court found the evidence sufficient to sustain the murder conviction. *Id.* at 8. The case was remanded to the trial court for a new punishment hearing. *Id*.

The State and the Appellant filed Motions for Rehearing in the Eleventh Court of Appeals. The motions were denied by the court of appeals on September 15, 2016. Both the Appellant and the State filed Petitions for Discretionary Review. On January 11, 2017, the Court denied Appellant's Petition for Discretionary Review but granted the State's Petition for Discretionary Review. The State filed their Brief on the Merits on February 13, 2017.

Due to confusion in Appellant's legal representation, this Court ordered the Trial Court to hold a hearing regarding Appellant's desire for new counsel, current qualifications for indignancy, and for clarification of Appellant's current counsel.

Appellate counsel was appointed on February 7th, 2017. Appellant's Brief on the Merits is due for filing on April 14th, 2017.

STATEMENT OF FACTS

Appellant and Michelle Reiter ("Reiter") had a long-term rocky intimate relationship for approximately five years. (RR Vol. 4, pp. 17, 23-25; RR Vol. 5, p. 85). The relationship ended in August 2012. (RR Vol. 4, p. 27, 39; RR Vol. 6, p. 136, RR Vol. 7, p. 126). Reiter quickly begun another sexual relationship with married man, Kemper Croft, which was reported to his wife, the same day Reiter disappeared. (RR Vol. 4, pp. 48-49, 51; RR Vol. 5, p. 6, 50; RR Vol. 6, pp. 92, 130, 137).

Since their separation, Appellant created a Facebook identity named "Rocky Switzer" and communicated with Reiter *via* Facebook. (RR Vol. 5, pp. 43, 47-48, 78; RR Vol. 7, p. 128). Appellant as "Rocky Switzer" arranged to meet Reiter at 8:30 p.m. on September 10, 2012 and drive to Santa Anna, Texas for dinner. (RR Vol. 4, pp. 37, 44; RR Vol 5. p. 49, RR Vol 6, p. 139).

Appellant and Reiter continued to communicate together after the break-up. (RR Vol. 4, p. 40). Appellant and Reiter arranged to meet in the early evening of September 10, 2012, prior to Reiter's planned meeting with "Rocky", so Appellant could return personal items in his possession to Reiter. (RR Vol. 4, pp. 54-55; RR Vol. 5, p. 28, RR Vol. 6, p. 68).

On the morning of September 11, 2012, Reiter's roommate reported Reiter missing. (RR Vol. 5, p. 39). Reiter's vehicle was found in a parking lot on September 12, 2012, at a recreational sports complex in south Brownwood. (RR

Vol. 5, pp. 33-34, 64). The investigation placed Appellant and Reiter's cell phones at the sports complex and then at various locations along rural roads from Brown County to Coleman County on September 10, 2014. (RR Vol. 7, pp. 16-29, 52-53).

Reiter's body was found on September 24, 2014, in a shallow grave located in Coleman County, Texas. (RR Vol. 5, pp. 55-56; RR Vol. 7, pp. 56, 61). Law enforcement nor medical personnel could determine Reiter's cause of death. (RR Vol. 7, pp. 72, 106).

FIRST GROUND FOR REVIEW

In reviewing sufficiency of the evidence, did the court of appeals err by:

- failing to consider any reasonable inferences that could be drawn from the evidence,

- separating evidence about the crime scene from evidence about the relationship between Appellant and the victim as a whole,

- speculating on evidence that was not offered by the State, and

- speculating on a hypothesis that was inconsistent with the defendant's guilt, during its' review of the sufficiency of the evidence to support a capital allegation that Appellant committed murder while in the course of kidnapping or attempting to kidnap the victim?

SECOND GROUND FOR REVIEW PRESENTED

In considering the "grey area" of criminal attempt law between acts that are simply mere preparation to commit an offense and acts that tend to effect the commission of an offense, may a reviewing court reject a jury's verdict during a sufficiency of the evidence review simply because the reviewing

court would have drawn the "imaginary line" in a different location than the jury?

SUMMARY OF ARGUMENT

The State failed to meet its burden at trial to present evidence which proved beyond a reasonable doubt Appellant committed capital murder. Specifically, the State failed to prove beyond a reasonable doubt, Appellant committed or attempted to commit the offense of kidnapping as the aggravating element of capital murder during the course of the murder. The opinion of the Eleventh Court of Appeals reversing the conviction for capital murder and remanding for a new punishment hearing for murder was correct and should be affirmed.

ARGUMENT AND AUTHORITIES

The State in both its grounds for review argues the Eleventh Court of Appeals incorrectly applied a non-deferential standard for review usurping the role of the jury as fact finder. Due to the similarity of the arguments and authorities in support of the arguments, Appellant respectfully briefs both grounds for review together.

A. Standard of Review

In *Brooks v. State*, this Court held factual and legal sufficiency reviews would no longer be considered separately, but together under the *Jackson v. Virginia* standard set by the United States Supreme Court. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Winfrey v. State*, 393 S.W.3d 763, 768

(Tex. Crim. App. 2013). Under *Jackson*, a reviewing Court considers all evidence deferentially in the light most favorable to the verdict to determine if based on the evidence and reasonable inferences from it, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

Deference is given to the factfinder to resolve issues of credibility and to weigh conflicting evidence. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). However, this deference is not absolute. "Juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Hooper v. State*, 214 S.W.3d at 15.

The Appeals Court has the final jurisdiction to review the sufficiency of evidence and to require a rational trier of fact to find the accused guilty of every essential element of a crime beyond a reasonable doubt serving as a safeguard to the due process guarantees of the United States Constitution. *Jackson*, 443 U.S. at 316; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009).

B. Controlling Legal Definitions

Under Section 19.03(a)(2) of the Texas Penal Code, a person commits capital murder if "the person intentionally commits the murder in the course of

committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat." TEX. PENAL CODE ANN. §19.03(a)(2).

In the present case, the States burden was to prove beyond a reasonable doubt *both* the Appellant intentionally caused the murder of Reiter *and* did so while in the course of committing or attempting to commit the offense of kidnapping. (CR. 9).

"Kidnapping is intentionally or knowingly restricting a person's movements, by either moving the person from one place to another or confining the person, without consent." *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003) (citing PENAL §§ 20.01(1)(A), (2)(A) & (B), 20.03(a)). The restriction of movement can be accomplished by force, intimidation, or coercion, so as to substantially interfere with the person's liberty. *Id.* The act(s) must be done with the intent to prevent the person's liberation by either secreting or holding the person in a place where the person is not likely to be found or using or threatening to use deadly force. *Id.* Deadly force is "force intended or known by the person acting to cause, or in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* The State is not required to prove a defendant moved a victim a certain distance or held a victim for a specific length of time. *Griffin v.* State, 491 S.W.3d 771, 775 (2016). The statute does require,

however, evidence of both restraint and intent to prevent liberation by secreting or holding a victim in a place where the victim is not likely to be found or using or threatening to use deadly force. *Id.*

In order to support a conviction for capital murder based on attempted kidnapping, the State is required to prove beyond a reasonable doubt Appellant had the specific intent to commit kidnapping, and Appellant committed an act amounting to more than mere preparation for kidnapping but fails to affect the commission of the offense intended." PENAL §15.01(a); See *Santellan v. State*, 939 S.W.2d 155, 162–63 (Tex. Crim. App. 1997), e.g. *Alvarado v. State*, 912 S.W.2d 199, 207 (Tex. Crim. App. 1995).

Convictions for attempted offenses necessarily must be considered on a case-by-case basis. *Gibbons v. State*, 634 S.W.2d 700, 707 (Tex. Crim. App. 1982). Criminal attempt does not require that every act short of actual commission of the offense be accomplished. *Santellan*, 939 S.W.2d at 163. "There is necessarily a gray area between conduct that is clearly no more than mere preparation and conduct that constitutes the last proximate act prior to actual commission of the offense." *Come v. State*, 82 S.W.3d 486, 489 (Tex. App.-Austin 2002, no pet.) (citing *McCravy v. State*, 642 S.W.2d 450, 460 (Tex. Crim. App. 1982)).

C. Argument Applicable to Kidnapping and Attempt

The State in their brief does not focus on the lack of direct or circumstantial evidence presented of kidnapping or attempted kidnapping but rather criticizes the Eleventh Court of Appeals for failing to give appropriate deference to the decision-making power of the jury. The State wants the Court to blindly accept all possible inferences the jury might have made from any evidence, however remote.

Appellant does not argue a fact-finder cannot make inferences. Rather Appellant, similar to the Eleventh Court of Appeals, argues a capital murder verdict was insufficient due to the lack of evidence for which to support such inferences. Even under a deferential standard, inferences alone cannot be held to support a verdict where there is an absence of evidence to base such inferences. See *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). Inferences which create a verdict outside of the evidence presented are *per se* unreasonable as they are not based on inferences but rather speculation. *Id.* at 16.

An alternative finding by this Court creates the danger of elevating inferences to the same level as evidence. Theoretically inferences could support any verdict where any evidence at all is presented. Appellant argues the Court should not cross this dangerous line.

Furthermore, Appellant argues the State is attempting to lower the standard of proof below beyond a reasonable doubt. The standard is not whether any fact-finder could have determined kidnapping or attempted kidnapping occurred, but rather is, whether any fact-finder, could have found based on the evidence and reasonable inferences from such evidence the essential elements of the offense *were all met beyond a reasonable doubt*. It is possible a conclusion reached by speculation may not be completely unreasonable, but if it is not sufficiently based on facts or evidence, speculation cannot support a finding beyond a reasonable doubt. *Hooper* at 16.

The States brief attempts to create inferences and then attempts to point to evidence in support of the inferences a jury might have used to support the verdict. The Eleventh Court of Appeals was correct to keep its focus first on the simplicity of the States failure to present evidence of kidnapping or attempted kidnapping beyond a reasonable doubt. To establish capital murder, the State requests this Court to engage in speculative decision making which cannot not follow reasonably from the evidence, certainly not to a beyond a reasonable doubt standard.

D. Kidnapping

The State admits in their brief there was no direct evidence Reiter was moved against her will or confined by the Appellant. The only evidence which

shows that Appellant and Reiter were in the same location the night she went missing is cell phone location data. (RR Vol. 7, pp. 17-19).

Cell phone data proves Reiter's accompaniment of Appellant was voluntary on September 10, 2012. Reiter's roommate testified Reiter left her home alone at approximately 6:15 p.m. (RR Vol. 4, p. 53). Cell phone data shows at 6:15 p.m., Reiter was near Reiter's home and Appellant's cell phone was near the sports complex, which is the same place the Appellant and Reiter later met. (RR Vol. 7, pp. 21-23). At 6:17 p.m., Reiter and Appellant shared a phone call. (RR Vol. 7, pp. 33-34). At 6:34 p.m., Reiter and Appellant's phones were located together at the sports complex. (RR Vol 7, p. 25). The evidence clearly shows Reiter in her vehicle with her phone travelled to Appellant's location at the sports complex. (States Exhibit 12).

Reiter's car was found two days later at the sports complex next to a busy road. (RR Vol. 5, pp. 65, 80). No witnesses testified to seeing a disagreement. There was no evidence of a struggle, fight or any argument between Appellant and Reiter at the sports complex on or in either Appellant's or Reiter's vehicles. (RR Vol. 5, pp. 64-65, 80-81; RR Vol. 6, p. 100). There was no physical evidence of stab wounds, gunshot wounds, evidence of strangulation, or other evidence of injury on Reiter's body, even after an autopsy. (RR Vol. 5, p. 85; RR Vol. 7, p. 8, 103, 105, 112).

Texas Ranger Hanna, admitted biological or DNA evidence found in or around Reiter's vehicle would have been important evidence of a struggle or an abduction, but none was found. (RR Vol. 5, p. 100). The Tarrant County medical examiner never could determine Reiter's cause of death. (RR Vol. 5, p. 83). Cindy Barrow, Reiter's roommate, testified when Appellant arrived home on September 10th, 2012, he did not seem angry, upset, anxious or acted different in any way. (RR Vol. 7, pp. 121-122).

The record contains no evidence, direct or circumstantial on which to draw any inference, whether Reiter left the sports complex voluntarily or even if she was still alive when Appellant left the complex. Likewise, there is no evidence that Reiter was later killed in the vehicle or at the burial site post abduction.

In *Herrin v. State*, the evidence proved the defendant in an altercation shot and killed the victim died immediately. *Herrin v. State*, 125 S.W.3d 436, 440 (Tex. Crim. App. 2002). Evidence in *Herrin,* was presented that the (1) defendant opened the tailgate of the victim's truck and defendant grabbed the victim under the arms and began dragging him to the back of the truck, (2) when a witness told defendant to stop dragging the victim, defendant pointed his fingers at him in the shape of a pistol and stated, "I've got something for you, too,"; (3) defendant relented only after the witness and told him to go home or the witness would kill

the defendant; and defendant later came back and dragged victims body with defendant's four-wheeled all-terrain vehicle to some underbrush. *Id.* at 438-439.

This Court overturned a jury verdict of capital murder finding the evidence was insufficient for the jury to have found that the murder was committed in the course of kidnapping or attempted kidnapping because there was no evidence that Herrin *intended* to kidnap the victim at or before the time he committed the murder. *Id.* at 440-41. The Court paid special attention to the fact the victim was killed immediately before there could be any kidnapping. *Id.*

In the present case, the Eleventh Court of Appeals used similar reasoning. The evidence that the kidnapping was committed in the course of the murder is that Reiter was found dead (murder) and her cell phone left the sports complex. The fact Reiter's cell phone left the sports complex could lead to any number of inferences, but none reasonable.

There was a lack of evidence presented of any abduction. Based on the evidence that Reiter could have been killed immediately or she could have gone with Appellant willingly. While one inference may have been Reiter was kidnapped, this inference alone without some additional supporting evidence does not establish kidnapping beyond a reasonable doubt. The inference is mere speculation.

A similar case was presented in *Guerra v. State*, where the defendant's body was found one and one-half to two miles away from her last reported sighting. *Guerra v. State*, 690 S.W.2d 901, 906 (Tex.App.--San Antonio 1985, no pet.). In *Guerra*, the defendant's cigarettes, cigarette lighter and glasses were left at her last seen place inferring she may have left hastily and under duress. *Id.* Evidence was presented she took these items with her wherever she went. *Id.* The victim's car was found in a parking lot with her purse inside leading to the inference the defendant was removed from by other non-voluntary means since she did not take her purse. *Id.* The autopsy report indicated the defendant died as a result of asphyxiation by manual strangulation. *Id.* She also had three knife wounds, a large gaping puncture wound in her neck, was beaten about the head and face, and one of her left toes was partially severed from her foot. *Id.*

Guerra is distinguishable from the current case as there is no evidence Reiter did not meet the Appellant voluntarily. There is no evidence of a struggle either at the Reiter's vehicle or during the trip where she was found. Additionally, there was no medical evidence, including the autopsy, that Reiter was abused in any manner. However, *Guerra* is informative as it shows what type of evidence, not presented in Appellant's case, which would support a jury verdict beyond a reasonable doubt in a capital murder case based on the elevated charge of kidnapping.

Without some evidence to substantiate a kidnapping, a rational jury just could not conclude Appellant completed the act of kidnapping Reiter and succeeding in Reiter's death in the same criminal episode.

E. Attempted Kidnapping

The Eleventh Court of Appeals was further correct determining a rational juror could not have believe beyond a reasonable doubt Appellant attempted to kidnap Reiter. Appellant did not complete an act amounting to more than mere preparation as required by the Texas Penal Code. PENAL §15.01(a). The Eleventh Court of Appeals did not act as a "Thirteenth Juror" nor drew their own "imaginary line" different from the jurors. Their correct determination, again, focused on the lack of evidence amounting to criminal attempt.

Evidence was presented that Appellant prior to September 10, 2012, performed several internet searches for "knockout drugs", "knockout drops" and similar terms. State's Exhibits 44-52. However, such searches were not near in time to Reiter's disappearance but rather performed in July of 2012, two months prior to Reiter's disappearance. State's Exhibits 44-52. This evidence has no probative value on which to make a reasonable inference regarding the date of the Appellant's disappearance. At best, the inference could be made that Appellant merely prepared to kidnap Reiter two months prior, but this is not probative of

attempted kidnapping during the course of murder. No evidence was admitted Appellant purchased, made, or obtained the drugs.

Appellant did purchase a .32 caliber ammunition on September 10th, 2012. RR Vol 4, pp. 50-51; RR Vol 5, pp. 37, 49-50. However, there is no evidence Appellant obtained the gun. The medical examiner testified conclusively Reiter had no gunshot wounds. (RR Vol. 7, p. 105).

The State further argues evidence regarding Appellant's deception as "Rocky Switzer" and particularly his planned date to meet Reiter for dinner is probative towards attempted kidnapping. However, this meeting never took place. The Appellant, not as "Rocky Switzer," but as Lanny Bush, met Reiter at the sports complex two hours earlier than the scheduled meeting time with "Rocky Switzer." Appellant could not have tricked Reiter into meeting him, when the meeting never took place. The actual meeting at 6:30 p.m. between Appellant and Reiter was not under false pretenses but was so Appellant could return items to Reiter's possession. (RR Vol 4, pp. 54-55).

The Appellant did not pick a private place to meet but rather chose a sports complex in a rural but well-traveled area near a major road. There is no evidence of what Appellant told Reiter in the three-minute conversation prior to the time but we do know they had the conversation and were not together at a location. Reiter arrived in her own car and met Appellant at the sports complex. Appellant

admitted during the interview he did not have the computer he represented he was going to Reiter at the meeting, but there are other items he also meant to return.

The crux of the argument is whether it is reasonable for a jury to find Appellant kidnapped or attempted to kidnap Reiter based on presumptions regarding evidence that was not presented and inferences from evidence which is remote in time and not causally linked to the murder or episode directly surrounding Reiter's disappearance.

The State is incorrect in arguing events remote and unrelated to the murder and even pure speculation, could prove actions Appellant's actions of aggravated offense of "attempted kidnapping" with murder beyond a reasonable doubt. This is mistaken, as Appellant's actions are at best, mere preparation. Texas Penal Code 15.01(a) requires more than just action but requires the action tend and fail to effect the commission of the offense. Thus an action attempting to commit the actual crime must take place and fail….i.e. the actor does not succeed in the crime. Research into a crime, purchasing items to be used in the crime, disguising one-selves does not prove attempt…. without something more… an actual action towards the victim to commit the crime and the failure of that action. While reasonable persons can disagree, the "gray area" discussed by this Court in *McCravy*, must be limited in some scope during review. *See McCrary*, 642 SW 2nd at 460.

For arguments and examples sake in the present case, had Reiter been found alive, then there would of potentially been evidence of Attempted Murder because, in theory, the State could have argued Appellant tried to commit the crime but failed in the intended result.

However, in the case before the Court there is simply not enough evidence the Appellant tried, tended to, or attempted to kidnap the Appellant and failed. Perhaps, a jury could infer at some point, Appellant was preparing for criminal activity against Reiter. However, that point of preparation did not contain a failed action while committing the murder.

The States attempted kidnapping theory fails at the lack of evidence of an act. During the voluntary meeting at the sports park, which lasted less than ten minutes according to cell records, between Appellant and Reiter either Reiter voluntarily went with Appellant, she involuntarily went with Appellant, or Reiter was killed on the scene. As discussed *supra,* Appellant argues the evidence does not show beyond a reasonable doubt, Reiter involuntarily went with Appellant, but there is absolutely no evidence Appellant tried to abduct Reiter at any time and failed in the commission.

In *Herrin,* also discussed *supra,* the evidence was arguably stronger than this case of attempted kidnapping. *Herrin*, 125 S.W.3d. at 441. However, the Court still found the jury's decision insufficient. *Id.*

Furthermore, in *Herrin* in support of an alternate attempted robbery theory of capital murder, the State presented evidence the victim had cash in his wallet before his murder, was known to carry money, the victim's wallet was missing after the murder, the pockets were intact (making it less likely that the wallet fell out of defendant's pocket when dragged) and finally, the wallet was never recovered. *Id.* at 442. The State further presented witness testimony the defendant had told the witness that the victim owed appellant money. *Id.*

The State argued in *Herrin*, similar to the present case that the jury's reasonable inferences could have supported their decision beyond a reasonable doubt and deference should be given to their decision. *Id.* at 442. However, the Court correctly, held even viewing the evidence in a light most favorable to the verdict, there was still insufficient evidence upon which a rational jury could find beyond a reasonable doubt the elements of capital murder. *Id.* at 443.

Again, reasonable inferences cannot take the place of evidence, otherwise Appellant could be convicted of capital murder based on mere speculation. It is the Appeals Courts duty to protect the due process rights of the accused. *Jackson*, 443 U.S. at 316.

In *Laster v. State*, this Court upheld a jury verdict of attempted kidnapping based only on the evidence the defendant, while walking past a young girl and her brother put his arm around [the girl's] waist and tried to pull her away. *Laster v.*

State, 275 S.W.3d 512, 516 (Tex. Crim. App. 2009). The jury also read a written statement from the defendant about voices in his head telling him to grab the little girl. *Id.*

The difference in *Laster* and the present case is stark. In *Laster,* there was the action of grabbing the child (act or attempt at act) and the failure of the act. Again, in the present case there is no evidence Appellant tried to abduct and failed to abduct Reiter.

The issue on review is not whether the evidence supports murder, but whether the evidence supports the aggravating elements of an additional offense equating capital murder committed during the course of the murder. *Herrin*, 125 S.W.3d. at 440. The evidence is not indicative beyond a reasonable doubt of abduction or attempted kidnapping and does not satisfy any element of the offense of kidnapping or attempted kidnapping. In the present case, the lack of evidence gives rise only to speculation of the any number of possible scenarios which could have occurred between September 10, 2014, and Reiter's body discovered on September 24, 2014.

PRAYER FOR RELIEF

PRAYER WHEREFORE, PREMISES CONSIDERED, Appellant Lanny Marvin Bush prays that the findings of the Eleventh Court of Appeals be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

By affixing my signature above, I hereby certify a true and correct copy of the foregoing APPELLANT'S BRIEF, was delivered on April 14th, 2017, via electronic service and electronic mail to:

The Honorable Heath Hemphill
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2) because it contains 5,668 words, excluding the parts of the brief exempted by Tex. R. App. P. 9(4)(i)(1).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in proportional spaced typeface using Microsoft Word software in Times New Roman 14-Point text and Times New Roman 12-point font in footnotes.

/S/ *Patrick D. Howard*

_____

Patrick D. Howard